IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 12, 2002

STATE OF TENNESSEE v. CHRISTOPHER FLAKE

Appeal from the Criminal Court for Shelby County
Nos. 97-09254, 97-09255 Bernie Weinman, Judge

No. W2001-00568-CCA-R3-CD - Filed June 12, 2002

The defendant, Christopher Flake, was convicted of two counts of first degree murder. After the defendant waived his right to have a jury determine punishment, the trial court imposed consecutive sentences of life imprisonment without the possibility of parole. In this appeal of right, the defendant asserts (1) that he established the affirmative defense of insanity by clear and convincing evidence; (2) that the trial court erred by denying his motion to suppress; (3) that the trial court erred by refusing his request to present the opening and rebuttal closing arguments; (4) that the trial court erred by dismissing a potential juror for cause; (5) that the trial court erred by admitting photographs of the victims; and (6) that the trial court erred by denying his request for a mistrial. Because the defendant proved by clear and convincing evidence that he was insane at the time of the shootings, the judgments of conviction are reversed. The defendant is declared not guilty by reason of insanity and the cause is remanded for proceedings pursuant to Tennessee Code Annotated § 33-7-303.

Tenn. R. App. P. 3; Judgments of the Trial Court Reversed and Remanded

GARY R. WADE, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Leslie I. Ballin and Steve E. Farese, Memphis, Tennessee, for the appellant, Christopher Flake.

Paul G. Summers, Attorney General & Reporter; Kim R. Helper, Assistant Attorney General; and John Campbell, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

On April 5, 1997, Angela Fultz and her husband, Mike Fultz, the first victim, spent a leisurely day at their residence. Shortly after 7:00 p.m., Mrs. Fultz called to her husband. When she heard no reply, Mrs. Fultz looked first in her backyard and then in the garage, where she found him, shot and lying in a pool of blood. She then called 911.

On that same evening, Anthony Turner, a neighbor of the Fultzes, noticed a strange car parked near his residence. When the car was parked in the same location some thirty minutes later, he went outside to investigate. The car was then driven toward the Fultz residence and Turner went back inside. Later, Turner heard gunshots. He identified the car he had seen as that owned by the defendant and identified the defendant as the driver.

Bernard Leo Miller, another neighbor, was working in his garage when he heard what he believed to be fireworks. Afterward, he saw a light-colored car with metallic paint and tinted windows drive away from the Fultz house.

Fred Bizot, the second victim, attended an 8:00 p.m. Alcoholics Anonymous meeting at the Holy Apostle Church. As Robert Wilford Gragg walked toward Bizot, Bizot greeted another individual in the parking lot. Gragg then saw a "rackety" car and heard what he believed to be backfire. Some ten minutes later, Jeremy Wilson opened the door to the church saying, "Fred was laid out." Gragg, who believed that Bizot had suffered a heart attack, called Bizot's wife, Jean Meacham Bizot. While medical personnel were attempting to revive Bizot, Gragg noticed a small hole in his chest.

Detective Eddie Scallions of the Shelby County Sheriff's Department investigated the shootings. In an interview with the defendant, Detective Scallions learned that the defendant attended A.A. meetings with Bizot. After acquiring a search warrant for the residence the defendant shared with his parents, Detective Scallions found an empty box of .22 caliber cartridges, several live .22 caliber rounds, and a box for a Jennings J.25 firearm in the defendant's bedroom. The box contained a receipt for a gun which the defendant had purchased several days earlier. Detective Scallions also found several prescription bottles containing Zoloft, Prozac, and Cylert. He was able to determine from the dates on the bottles that the defendant had been taking medication for at least two years prior to the shootings.

Officer Robert Brandon Lampley of the Shelby County Sheriff's Department participated in the arrest. According to Officer Lampley, the defendant expressed no emotion when arrested and offered no resistance to the officers.

Officer Johnny Brown arrived shortly after the arrest and questioned the defendant, who was seated in the backseat of a patrol car. According to Officer Brown, the defendant knew why the police were there. When he asked the defendant if the gun was in the car, the defendant answered, "Yes." Officer Brown found the Jennings firearm in the glove box of the car and recovered a shell casing from the right rear seat of the vehicle. When Officer Brown learned the defendant had attended an A.A. meeting on the previous evening, he asked the defendant if he had been in an altercation at the meeting. At that point, the defendant acknowledged having "shot the guy." Officer Brown described the defendant as showing no emotion during the interrogation.

At trial, Dr. O.C. Smith, who performed both autopsies, testified that Fultz's death was caused by multiple gunshot wounds to the chest and back. Five bullets were recovered from the

body. Dr. Smith stated that Bizot died as a result of a single gunshot wound to the chest. Tests established that the bullets recovered from each victim were fired from the defendant's gun.

Michael Todd Musso, a friend and co-worker of the defendant, testified that the defendant appeared unusually agitated at work on the day of the shootings. He described the defendant's work performance that day as "really bad." According to Musso, the defendant spoke very little and behaved very strangely at lunch, tearing his hamburger into small pieces but not eating any of it. He characterized the defendant as "just kind of out there."

The defendant's father, James R. Flake, who said that the defendant had suffered emotional problems since the age of eleven, testified that his son had been treated by a number of psychologists and psychiatrists and had been hospitalized on several occasions. He stated that the defendant had attempted to function on a normal level, attending college and holding down a job, but had failed the majority of his classes and had not been able to maintain steady employment. Flake described the defendant's behavior as increasingly bizarre in the days and months leading up to the shootings and claimed that the defendant told him one or two months before the shootings that someone in his A.A. group was running drugs from Mexico. He recalled that the defendant also expressed fear that another individual at A.A. was going to beat him to death with a baseball bat. At about the same time, Flake discovered a piece of paper on which the defendant had scribbled, "Hazel Goodall, the first woman to hit me." Hazel Goodall was the defendant's elementary school principal.

Several days later, the defendant informed his father that he had caused a Florida plane crash because he had traveled there two years earlier with a man named Bill Crawford. Afterward, the defendant remarked that he had seen an old classmate at a service station and then whispered, "Buchanani, has the anwer." The defendant claimed to his father that a teacher at Farmington Elementary School had "bad mouthed" him and prevented him from being elected most popular. After saying, "[t]he answer is getting closer, I'm getting closer to the answer," the defendant gave his father a business card and emphasized the importance of his keeping the card. Later, while working as a mover, the defendant provided his father with the names of two customers, claiming they had taken a truck belonging to a friend from A.A. According to Flake, none of the information the defendant provided proved to be truthful.

In March of 1997, the defendant told his father that he knew who was responsible for the bombings of the Oklahoma City federal building and the World Trade Center. During the same month, the defendant had driven bare-footed in a thunderstorm to a convenience market during the middle of the night. While at the market, the defendant took a pack of cigarettes from the shelf, waved to the clerk, smiled, and walked out; when the police arrived at the Flake residence to investigate the theft, Flake required the defendant go back and pay for the cigarettes. The defendant explained that he had been smoking for a long time and that "they" owed him the cigarettes. As a result of this and other bizarre behavior, Flake arranged for the defendant to meet with Dr. Janet Johnson on April 1, just four days before the shooting. On the day following the appointment, Flake received a call from Dr. Johnson, who explained that she had been telephoned by a man who had seen the defendant place an envelope in his mailbox. The envelope contained samples of the

prescription medication Prozac that Dr. Johnson had given to the defendant during their meeting. When confronted with this information, the defendant informed his father that he had seen the man working under the hood of a truck and believed that he was in trouble and needed the medicine. Flake believed that the defendant "had lost his mind" and scheduled another appointment with Dr. Johnson for the following day.

James Flake recalled that on the day of the shootings, the defendant left at his usual time to attend the A.A. meeting and returned home at approximately 11:00 p.m. On the next day, the defendant worked on his car, took his dog to the park, grilled outside with his family, and made plans to watch a movie later that night. At approximately 5:30 p.m., he told his father that he was going to a meeting at Central Church. Flake described the defendant's demeanor as "[p]erfectly, fine. Came downstairs, hugged and kissed his mother, that's it, just a regular day." When the defendant was arrested for murdering Fultz and Bizot and shooting Turner Carpenter, a pastoral counselor at Central Church, the defendant, according to his father, was "blank."

Turner Carpenter testified that the defendant had made, but failed to keep, several appointments with him prior to the shooting of Fultz and Bizot. On the day after their murders, the defendant arrived at Carpenter's office and asked to meet with him. Because he was meeting with another individual and was not expecting the defendant, Carpenter asked the defendant to wait outside the office. Almost immediately, the defendant "leaped out from the couch" and "screamed my name out, just as loud as he could scream it." Carpenter described the defendant, who was pointing a gun at him, as "really angry." The defendant fired the gun once, striking Carpenter in the hand. The bullet traveled through Carpenter's hand and into his lung, liver, and diaphragm. Carpenter, who did not know the defendant's name at the time of the shooting, testified at trial that the defendant did not appear to be under the influence of drugs or alcohol.

Dr. Melvin Goldin, a psychiatrist, first treated the defendant in 1991 and continued until 1995. Prior to trial, the defendant had been under the care of Dr. Richard Luscomb. Dr. Goldin noted that the defendant was hospitalized in 1988 because of "growing sadness, irritability, . . . and some alcohol problems," and was hospitalized again in 1989 and 1990 due to suicidal thoughts. Dr. Goldin observed that the defendant had "[a] gross preoccupation with various things of no consequence" and made a diagnosis of obsessive compulsive disorder. He prescribed a variety of medications over a period of four years, including Anafranil, Clomipramine, Imipramine, Palamor, Nortriptyline, Norpramine, Prozac, and lithium. Dr. Goldin testified that the defendant's condition fluctuated and that he experienced some improvement. At their last meeting, however, he observed that the defendant was "rather fragile" and "just wasn't functioning very well." Dr. Goldin referred the defendant to Dr. Janet Johnson.

Dr. Lynne Zager, a clinical psychologist who evaluated the defendant at the request of the state to determine whether he was competent to stand trial, made a diagnosis of schizophrenia paranoid type which she described as a "severe and persistent mental illness." She asked that the defendant be sent to Middle Tennessee Mental Health Institute (MTMHI) for evaluation and treatment. According to Dr. Zager, schizophrenia sufferers experience false fixed beliefs, possible

hallucinations, and judgment problems. She recalled that the defendant had a number of delusional beliefs when she evaluated him several months after the crime; for example, the defendant expressed fear that television personality David Letterman was part of a conspiracy to cause him harm, that an individual at the jail was the notorious serial killer Jeffrey Dahmer, and that another inmate was plotting to harm his father. When asked by Dr. Zager why he killed the victims, the defendant responded that one victim was responsible for the bombings of the World Trade Center and the Oklahoma City federal building and the other was responsible for the Turner Diaries. The defendant explained that he believed he had to kill the victims to protect society. Dr. Zager testified that the defendant had a history of substance abuse, which she described as not uncommon among those suffering from schizophrenia.

Dr. Samuel Craddock, a psychologist employed at Middle Tennessee Mental Health Institute, was part of the forensic team that conducted a mental health evaluation. He testified that psychological testing established that the defendant was within the average range of intelligence and possessed college-level reading comprehension, but revealed that his reasoning skills were equal to that of a fifth-grader. Dr. Craddock determined that the defendant was not a malingerer, explaining that malingerers generally experience deficits in both reading comprehension and reasoning. He concluded that the defendant was suffering from schizophrenia at the time of the shootings and that the defendant believed that killing the victims was justified. Although Dr. Craddock admitted that he initially suspected that the defendant was malingering, he stated that further testing alleviated his suspicions. At the time of trial, the defendant was receiving medication to alleviate the symptoms of schizophrenia. Dr. Craddock explained that the defendant was treated for schizophrenia at MTMHI for 290 days in an effort to establish his competence for trial.

Dr. Rokeya Farooque, a psychiatrist at Middle Tennessee Mental Health Institute and professor at Meharry Medical College, also participated in the initial evaluation of the defendant. Dr. Farooque stated that during the thirty-day in-patient evaluation, the defendant did not receive any medication and heard voices and experienced delusional thinking. She confirmed that the defendant believed that one shooting victim was responsible for the Oklahoma City bombing and the other was responsible for the World Trade Center bombing. Dr. Farooque stated that the defendant claimed that he was an FBI agent with a duty to kill the victims. According to Dr. Farooque, the defendant repeatedly said, "I did not do anything wrong." At the end of the initial evaluation, the forensic team, including Dr. Farooque, determined that the defendant was not competent to stand trial.

After the evaluation, the defendant was sent to jail and then back to MTMHI for ten months of evaluation and treatment before being sent to Western Mental Health Institute (Western), a less secure psychiatric facility. Dr. Farooque diagnosed the defendant with "schizophrenia paranoid type in excess one." She explained that schizophrenia is a very serious mental disease marked by auditory hallucinations, fixed false beliefs, disorganized affect, negative symptomology, and allergia. It was her opinion that a patient must experience these symptoms for at least six months before a diagnosis of schizophrenia is appropriate. Dr. Farooque testified that the defendant experienced a gradual decline in mental health that is characteristic of those suffering from schizophrenia. She recalled that as early as 1988, the defendant was diagnosed as having depression with schizoid features. Finally,

Dr. Farooque concluded that on the day of the shootings, the defendant was suffering from "schizophrenia paranoid type" and that he was not malingering. It was her opinion that the defendant did not understand that it was wrong to shoot the victims.

Dr. John Aday, who was working as the staff psychologist for the forensic unit at Western Mental Health Institute, observed the defendant after he was transferred to that facility from MTMHI. Dr. Aday and other members of the forensic team at Western were asked to evaluate the defendant to determine his competency to stand trial. It was his opinion that in February of 1999, some two years after the shootings, the defendant, despite continuing hallucinations and delusions, was competent to stand trial. Dr. Aday concluded that although the defendant's condition had improved by the time of trial, he would not likely experience any further improvement despite continuing treatment. It was his opinion that the defendant was suffering from schizophrenia paranoid type and continued to believe that he was a special government agent who did his duty when he shot the victims. Dr. Aday did not disagree with the conclusions of Drs. Craddock and Farooque that at the time of the crimes, the defendant was unable to appreciate the wrongfulness of shooting the victims.

Dr. Hilary Linder, a psychiatrist working at Western, testified that the defendant was suffering from schizophrenia paranoid type and that the defendant was not malingering. Further, Dr. Linder stated that he had no doubt that the defendant was suffering from paranoid schizophrenia at the time of the shootings. It was his opinion that the defendant did not understand that it was wrong to shoot the victims.

Dr. John Hutson, a clinical psychologist who examined the defendant three days after he was arrested, met with the defendant and his family on a number of occasions prior to trial. Although he was employed by the defense, Dr. Hutson recalled that none of the interviews he had with the defendant went very smoothly, describing the defendant as "extraordinarily disturbed" based on psychological testing. Dr. Hutson diagnosed the defendant with schizophrenia and found that the defendant was experiencing symptoms of both paranoid schizophrenia and disorganized schizophrenia. It was his opinion that the defendant was "one of the three most disturbed[] criminal defendants I've ever seen in my history." As a part of his practice as a clinical psychologist, Dr. Hutson had visited the jail four or five times a week since 1974 for the purpose of evaluating those accused of criminal acts. He also believed that the defendant was unable to appreciate the wrongfulness of his actions on the day of the shooting.

The state offered no rebuttal proof on the sanity issue. No witness, expert or otherwise, offered any evidence to contradict the insanity defense.

I

The defendant first asserts that he met his burden to establish the affirmative defense of insanity by clear and convincing evidence. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be

given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilty removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

At the time of the shootings, first degree murder was defined as:

> (a) First degree murder is:
> (1) A premeditated and intentional killing of another;
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse or aircraft piracy; or
> (3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

Tenn. Code Ann. § 39-13-202(a)(1997).

Here, the defense concedes that the defendant murdered each of the victims but argues that the overwhelming proof at trial established that because of his mental illness, he was unable to appreciate the wrongfulness of his conduct and must, therefore, be declared not guilty by reason of insanity. See Tenn. Code Ann. § 39-11-501(a). Tennessee Code Annotated § 39-11-501(a) provides as follows:

> It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Tenn. Code Ann. § 39-11-501(a). The statute places the burden on the defendant to establish insanity by clear and convincing evidence; the state is not required to prove sanity. See State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999). "Clear and convincing evidence" is "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Id. Although a higher standard than "preponderance of the evidence," this standard

is less than "beyond a reasonable doubt." O'Daniel v. Messier, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

Our supreme court has held that when determining the issue of insanity, the jury may consider both lay and expert testimony and may discount expert testimony which it finds to be in conflict with the facts of the case. State v. Sparks, 891 S.W.2d 607, 616 (Tenn. 1995); State v. Jackson, 890 S.W.2d 436, 440 (Tenn. 1994). The jury is not required to resolve conflicts between expert testimony and testimony as to the facts of the case in favor of expert testimony and must determine the weight and credibility of each in light of all the facts and circumstances of the case. Edwards v. State, 540 S.W.2d 641, 647 (Tenn. 1976). In determining the defendant's mental status at the time of the crime, the jury may look to the evidence of the defendant's actions and words at or near the time of the offense. Sparks, 891 S.W.2d at 616; Humphreys v. State, 531 S.W.2d 127, 132 (Tenn. Crim. App. 1975).

This case is unusual because another panel of this court has specifically addressed the issue of the defendant's sanity at the time of the crime. In State v. Christopher M. Flake, No. W2000-01131-CCA-MR3-CD (Tenn. Crim. App., at Jackson, July 13, 2001), perm. to appeal granted (Dec. 17, 2001), this court reviewed the defendant's conviction for the attempted first degree murder of Turner Carpenter on the day after the shootings in this case. After a review of evidence that, as to the sanity issue, was practically identical to that presented in this case, this court ruled as follows:

> After a thorough review of the evidence, we reach the following inescapable conclusion: a rational trier of fact could only find that there is no serious or substantial doubt that the defendant, at the time of the shooting, was unable to appreciate the wrongfulness of his act as a result of a severe mental disease. Thus, the defense of insanity was established by clear and convincing evidence.

Flake, slip op. at 6 (citation omitted). The panel concluded that "the record [did] not reveal sufficient lay testimony, nor expert testimony, concerning the defendant's mental state at or near the time of the shooting that would justify rejection of the insanity defense." Id. at 7.

In this trial, four psychologists and two psychiatrists testified that the defendant was suffering from paranoid schizophrenia at the time of the crimes and that because of his mental disease, he was unable to appreciate the wrongful nature of his actions. Every mental health professional who evaluated the defendant concluded that he met the test of insanity when he shot and killed each of the victims. In the Carpenter trial, the state attempted to rebut the testimony of the numerous experts who had conducted the examinations. In this trial, the state offered no rebuttal proof. It is our view that if the defendant proved the defense of insanity by clear and convincing evidence in the Carpenter case, the evidence offered here is even clearer and more convincing. No rational trier of fact could have found otherwise. The defendant's convictions for first degree murder must, therefore, be reversed and the judgment forms modified to indicate that the defendant is not guilty by reason of insanity. The cause is remanded to the trial court for proceedings pursuant to Tennessee Code Annotated § 33-37-303.

In a related issue, the defendant asserts that, should this court find that he failed to meet his burden of proof with regard to the affirmative defense of insanity, his convictions for first degree murder should be reduced to voluntary manslaughter. Citing Davis v. State, 28 S.W.2d 993 (Tenn. 1930), the defendant argues that because he was operating under the insane delusion that he was an FBI agent whose duty was to kill the victims, this court should find that he killed the victims after adequate provocation. Notwithstanding our finding that the defendant's convictions must be reversed, it is our duty to address this issue. See State v. Pendergrass, 13 S.W.3d 389, 395 (Tenn. Crim. App. 1999).

In Davis, our supreme court found that the facts supported only a conviction for voluntary manslaughter, rather than first degree murder, because the defendant was operating under the insane delusion that the victim was having an illicit affair with his wife. In our view, Davis is distinguishable from this case because there was no evidence that the defendant acted as a result of provocation, real or imagined. See State v. Brian Val Kelley, No. M2001-00461-CCA-R3-CD (Tenn. Crim. App., at Nashville, May 7, 2002). It was the defendant's apparent belief that he acted under a duty to murder the victims as a means of protecting society.

II

The defendant next contends that the trial court erred by denying his motion to suppress the evidence seized from his vehicle and the statements he made to the authorities. The defendant asserts that because of his severe mental illness, he could not have knowingly waived his constitutional right to remain silent and could not have knowingly executed a consent to search his vehicle.

The standard of review applicable to suppression issues is well established. When the trial court makes a finding of facts at the conclusion of a suppression hearing, the facts are accorded the weight of a jury verdict. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The trial court's findings are binding upon this court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also Stephenson, 878 S.W.2d at 544; State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). Questions of credibility of witnesses, the weight and value of the evidence and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. Odom, 928 S.W.2d at 23.

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V; see also Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment's protection against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment). Article I, Section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. "The significant difference between these two provisions is that the test of voluntariness for confessions under Article I, § 9 is broader and more protective of individual rights than the test of voluntariness

under the Fifth Amendment." State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992). Similarly, both the state and federal constitutions protect individuals from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression. See U.S. Const. amend. IV; Tenn. Const. art. I, § 7; Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022 (1971); State v. Bridges, 963 S.W.2d 487, 490 (Tenn. 1997).

A defendant may waive his right to remain silent; the waiver, however, must be made voluntarily, knowingly, and intelligently. Miranda v. Arizona, 384 U.S. 436, 478 (1966); State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). In order to effect a waiver, the accused must be adequately appraised of his right to remain silent and the consequence of deciding to abandon it. State v. Stephenson, 878 S.W.2d 530, 544-45 (Tenn. 1994). In determining whether a confession was voluntary and knowing, the totality of the circumstances must be examined. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997). If the "greater weight" of the evidence supports the court's ruling, it will be upheld. Id. Yet, this court must conduct a de novo review of the trial court's application of law to fact. State v. Bridges, 963 S.W.2d 487 (Tenn. 1997); State v. Yeargan, 958 S.W.2d 626 (Tenn. 1997).

It is well settled that a search conducted pursuant to a voluntary consent is an exception to the requirement that searches and seizures be conducted pursuant to a warrant. State v. Bartram, 925 S.W.2d 227, 230 (Tenn. 1996) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). The validity of the search of the defendant's car depends on whether, based on the totality of the circumstances, the consent was voluntary. See Schneckloth, 412 U.S. at 227, 248-49, 93 S. Ct. at 2047-48; Liming v. State, 220 Tenn. 371, 375, 417 S.W.2d 769, 770 (1967). "To pass constitutional muster, consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). The following eight factors have been used when evaluating the voluntariness of the consent:

(1) the voluntariness of the accused's custodial status;
(2) the length of the detention of the accused before he or she gave consent;
(3) the presence of coercive police procedures;
(4) the accused's awareness of his or her right to refuse to consent;
(5) the accused's age, education and intelligence;
(6) whether the accused understands his or her constitutional rights;
(7) the extent of his or her previous experience with the police; and
(8) whether the accused was injured, intoxicated, or in ill health.

See generally State v. Carter, 16 S.W.3d 762, 769 (Tenn. 2000); see also United States v. Ivy, 165 F.3d 397, 402 (6th Cir. 1998). Although all eight factors are relevant, no single factor is dispositive and this list does not represent all factors which may be relevant to the issue of voluntariness. See Carter, 16 S.W.3d at 769.

Here, Officer Brown testified at the suppression hearing that before asking any questions of the defendant, he informed him of his right to remain silent and his right to counsel. It was only after the defendant expressed an understanding of his constitutional rights that Officer Brown explained the consent to search form and informed the defendant that officers wanted to remove the gun from his vehicle for safety purposes. Although the defendant appeared fatigued and distraught during the questioning, it was uncontested that he voluntarily signed the consent to search form.

Dr. Hutson testified that at the time of questioning, the defendant was suffering from a severe mental illness that would have prevented him from knowingly and intelligently waiving his constitutional rights. It was Dr. Hutson's opinion that while the defendant may have understood the words of the rights that were read to him, he could not have rationally applied them to his situation because he was operating on a different level of reality.

In the case involving the shooting of Carpenter, this court determined that any error occasioned by the trial court's failure to grant the motion to suppress was harmless. The same is true in this instance. It is undisputed that the defendant murdered each of the victims. It was inevitable that the murder weapon, which was in the defendant's car at the time of his arrest, would have been recovered by the police. The search warrant, validly issued, yielded a receipt for the weapon, its container, and .22 caliber cartridges. The fatal bullets were fired by the gun. Any error by the admission of the evidence was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967).

III

The defendant complains that the trial court erred by denying his request to present the opening and rebuttal closing arguments at the conclusion of the proof. Tennessee Rule of Criminal Procedure 29.1(d) provides, in pertinent part, as follows:

> [W]hile the State, having the burden of proof, shall have the right to open and close the argument, this right shall not be exercised in such way as to deprive the defendant of the opportunity to fully answer all State argument. The trial judge upon motion shall enforce this purpose by appropriate rulings.

The defendant argues that because he had the burden of proving the affirmative defense of insanity by clear and convincing evidence, he is entitled to both open and close the final arguments of counsel. Notwithstanding the defendant's burden of proof with regard to the issue of the insanity defense, the state had the burden of establishing the defendant's guilt beyond a reasonable doubt and was entitled to begin and end closing arguments. Further, the order of final argument is not inherently prejudicial to the defendant. See State v. Smith, 857 S.W.2d 1, 24 (Tenn. 1993). Under these circumstances, it is our view that the trial court did not err by allowing the state to open and close final arguments.

IV

The defendant next asserts that the trial court erred by dismissing a potential juror for cause before giving defense counsel an opportunity to question the individual. "The ultimate goal of voir dire is to see that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court." State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993). The trial court may excuse prospective jurors during voir dire "for good cause appearing." Tenn. Code Ann. § 22-2-308(d); see also Tenn. R. Crim. P. 24(b). In examining a potential juror's impartiality, the standard for dismissal for cause is "whether the juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521 (1980)); see also State v. Mann, 959 S.W.2d 503, 533 (Tenn. 1997); State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989). The trial court's findings regarding impartiality are entitled to a presumption of correctness and the burden rests with the defendant to establish by clear and convincing evidence that the trial court's determinations were erroneous. State v. Smith, 993 S.W.2d 6, 29 (Tenn. 1999); Alley, 776 S.W.2d at 518.

The defendant, citing Alley, 776 S.W.2d at 518, argues that the trial court should have permitted defense counsel to question potential juror C. Watkins before dismissing her for cause. In Alley, our supreme court expressed concern when the trial court dismissed a juror for cause without allowing defense counsel to question the juror when there was "leeway for rehabilitation." Id.; see also State v. Strouth, 620 S.W.2d 467 (Tenn. 1981). The distinguishing factor, however, is that here there was no leeway for rehabilitation. The juror at issue unequivocally stated that she could not impose the death penalty "under any circumstances." In our view, there was no error.

In a related issue, the defendant complains that the trial court erred by refusing to allow individual voir dire of potential jurors. The defendant correctly points out that individual voir dire is required only when there exists a "significant possibility" that a juror has been exposed to potentially prejudicial material. State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1998). Because the defendant has failed to show that such a possibility existed in this case, he is not entitled to relief on this ground.

V

As his next assignment of error, the defendant contends that the trial court erred by admitting into evidence photographs of the victims taken prior to their death. The admissibility of photographs is governed generally by Tennessee Rule of Evidence 403. See also State v. Banks, 564 S.W.2d 947 (Tenn. 1978). The evidence must be relevant and its probative value must outweigh any prejudicial effect. Tenn. R. Evid. 403; Banks, 564 S.W.2d at 950-51. Whether to admit proffered photographs rests within the sound discretion of the trial court and will not be reversed absent a clear showing of an abuse of that discretion. State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993); State v. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985).

Here, the state introduced photographs taken of the victims during their lifetimes. The defendant contends that the photographs were irrelevant and that, if relevant, their probative value is outweighed by the possibility of unfair prejudice. See Tenn. R. Evid. 401, 403. The state contends that the photographs were relevant to establish the identities of the victims. In our view, these photographs, while marginally relevant, were cumulative to other evidence which provided the identities of the victims. The prejudice, under these circumstances, would have been minimal. In our view, any error in the admission of the photographs qualified as harmless. See Tenn. R. App. P. 52(a).

VI

Finally, the defendant asserts that the trial court should have granted his request for a mistrial after the state made reference to the fact that another jury had rejected Dr. Craddock's opinion that the defendant was insane at the time of the crime. The defendant argues that the reference to the earlier rejection of Dr. Craddock's opinion suggested that the jury should reject the opinion because it had been rejected before.

"The entry of a mistrial is appropriate when the trial cannot continue for some reason, or if the trial does continue, a miscarriage of justice will occur." State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial is within the sound discretion of the trial court, and this court will not disturb the trial court's determination unless a clear abuse of discretion appears on the record. Id.

Here, the following colloquy occurred during the recross-examination of Dr. Craddock:

> Q: Now, the defense lawyer over here, asked if you'd testified and if your opinions had been found correct; is that correct? Do you remember him asking you that?
> A: If my opinions had been found correct?
> Q: Yes.
> A: If I replied, yes, I should say that there has been individuals who have supported my diagnosis or opinions, but to say they're correct, they're simply opinions.
> Q: That may have been totally rejected by the jurors in the past; haven't they?

The trial court sustained defense counsel's objection, finding that the question was not "appropriate," and instructed the jurors to disregard the question. At the end of Dr. Craddock's examination, the defendant asked the court to declare a mistrial based upon the question. The trial court denied the request, concluding that the question was not so suggestive of the other proceeding as to require a new trial. In our view, the trial court did not abuse its discretion. This issue is without merit.

CONCLUSION

In any case involving a demonstrated claim of insanity on the part of the accused, the responsibilities of both the jury and the reviewing court are particularly difficult. This matter is certainly no exception to that general proposition. In this instance, the law requires the exoneration of the defendant and his actions as legally excusable despite his obvious responsibility for the death

of two completely innocent victims. Even though the evidence was clear and convincing, the duty of this jury to declare the defendant not guilty by reason of insanity under these circumstances proved to be too difficult a task.

Because the proof offered at trial established the defendant's insanity at the time of the offenses, the judgments of the trial court must be reversed. This cause is remanded for further proceedings regarding involuntary commitment pursuant to Tennessee Code Annotated § 33-7-303.

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GARY R. WADE, PRESIDING JUDGE